Before the
**FEDERAL COMMUNICATIONS COMMISSION**
Washington, D.C. 20554

ORIGINAL FILE

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| In the Matter of | ) | |
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| Reexamination of the Policy | ) | GC Docket No. 92-52 |
| Statement on Comparative | ) | |
| Broadcast Hearings | ) | |

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Federal Communications Commission
Office of the Secretary

To the Commission

**MOTION TO AMEND NOTICE OF PROPOSED RULEMAKING AND RESCHEDULE PROCEDURAL DATES**

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**TABLE OF CONTENTS**

**SUMMARY**

Four major national organizations, representing over 750,000 people, have had numerous twelve rulemaking proposals sitting on the shelf at the FCC since September, 1990. Four of those proposals relate to comparative hearing preferences and are therefore germane to this docket. In MM Docket 90-264 (Comparative Hearing Procedures), the Commission declared that it would treat these four proposals, together with an anti-minority counterproposal filed by Jeffrey Rochlis, as a petition for rulemaking. Within two months, the Commission had assigned RM-7740 to Rochlis' counterproposal, and given "RM" numbers to two other anti-minority proposals affecting comparative hearings. The Commission neither included the Civil Rights Organizations' proposals in RM-7740 nor assigned a separate "RM" number to the Civil Rights Organizations' proposals.

In the instant NPRM, the Commission has called for comment on the Rochlis proposal but has not even mentioned the existence of the Civil Rights Organizations' proposals. Nor did the instant NPRM, which all but endorsed the Rochlis proposal, note that the Civil Rights Organizations had opposed finders preferences.

These Commission errors and omissions cap two decades of studied ignorance, delays, and pocket vetos of rulemaking proposals filed by minority organizations. Nonminorities' rulemaking proposals are routinely given "RM" numbers immediately and put out for comment.

The Commission must begin to treat all rulemaking participants equally. To accomplish this, it should issue a supplemental NPRM seeking comment on the Civil Rights Organizations' proposals, and extend the comment dates accordingly.

A Time-Sensitive Motion for Stay, filed contemporaneously with this Motion, asks the Commission to proceed no further with this docket until all process due the Civil Rights Organizations has been provided to them.

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To the Commission

**MOTION TO AMEND NOTICE OF PROPOSED RULEMAKING AND RESCHEDULE PROCEDURAL DATES**

The National Association for the Advancement of Colored People ("NAACP"), the League of United Latin American Citizens ("LULAC") and the National Black Media Coalition ("NBMC") ("Civil Rights Organizations") respectfully move to amend the Notice of Proposed Rulemaking in the Matter of Reexamination of the Policy Statement on Comparative Broadcast Hearings, FCC 92-98 (released April 10, 1992) ("Comparative Hearing Policies NPRM") to include a request for comment on comparative hearing policy proposals filed September 14, 1990 and refiled January 22, 1991 by the Civil Rights Organizations.

This Motion seeks to place the substantive proposals of the Civil Rights Organizations on the same procedural footing as the Commission has placed various anti-minority proposals for which it seeks comments in response to the Comparative Hearing Policies NPRM. As shown herein, the Comparative Hearing Policies NPRM violates fundamental principles of procedural due process and equal protection, and vacates, sub silentio, the Commission's own previous assurance that it would afford the Civil Rights Organizations' substantive proposals the same procedural relief as that afforded to anti-minority substantive proposals.

In order to facilitate the effectuation of the relief sought in this Motion, the Civil Rights Organizations are simultaneously filing a Motion for Stay of the procedural dates in this docket.

**BACKGROUND**

On September 14, 1990, the Civil Rights Organizations timely filed Comments on the NPRM in MM Docket No. 90-264, Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 5 FCC Rcd 4050 (1990) ("Comparative Hearing Procedures NPRM"). The Civil Rights Organizations' Comments in response to the Comparative Hearing Procedures NPRM are correctly characterized as follows in Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases (Report and Order) 6 FCC Rcd 157, 164 ¶52 (1990) ("Comparative Hearing Procedures R&O"):

> A number of commenters submitted proposals to change the policies under which the Commission awards comparative credits and demerits in comparative broadcast proceedings...The NAACP [actually, the Civil Rights Organizations] suggests that interests held by Minority Enterprise Small Business Investment Companies not be attributable; that we expand broadcast experience credit to include comparable management experience; revise the minority sensitivity credit, making it available in any proceeding, not just to counter a minority ownership credit; and award comparative credit to applicants that have divested an FM or VHF TV station to minorities for no more than 75% of fair market value. These proposals were not raised in the Notice, and they are beyond the scope of this proceeding which focuses, for the most part, on the procedures employed in broadcast comparative cases rather than the comparative criteria used to evaluate the applicants.

Commissioner Quello issued a Separate Statement accompanying the Comparative Hearing Procedures R&O, specifically citing to the Civil Rights Organizations Comments. He sought to

> direct the Commission's attention to certain issues raised by commenters that were outside the scope of the instant proceeding. Specifically, several commenters advocated changing the policies for assigning comparative merits and demerits [citing the Civil Rights Organizations' and Radio New Jersey's Comments.]...We should not shelve the idea of reevaluating our comparative criteria. I think the Commission should initiate a new rulemaking proceeding to reexamine some of our policies for evaluating competing applications. Some of the proposals submitted in this proceeding might provide a good point of departure for such an analysis.

Id. at 172-173.

On January 22, 1991 the Civil Rights Organizations sought reconsideration of the Comparative Hearing Procedures R&O in a filing styled "Petition for Reconsideration, or in the Alternative Petition for Rulemaking" ("Reconsideration/Rulemaking Petition"). Therein, the Civil Rights Organizations requested the Commission to either rule on the merits of their proposals or "treat this filing as a Petition for Rulemaking and assign it an 'RM' number pursuant to 47 CFR §1.403 ('all petitions for rulemaking...will be given a file number, and promptly thereafter, a "public notice' will be given.')" Reconsideration/Rulemaking Petition, January 22, 1991, at 1.

The Reconsideration/Rulemaking Petition argued that the scope of the Comparative Hearing Procedures NPRM was extremely broad and open-ended, and that an adjustment to the Anax policy made in the Comparative Hearing Procedures R&O showed that the intent of the Comparative Hearing Procedures NPRM was to address

substantive as well as procedural questions involving comparative hearings. See Reconsideration/Rulemaking Petition at 2; Comparative Hearing Procedures NPRM, 5 FCC Rcd at 4055 ¶45. The Civil Rights Organizations requested that if on reconsideration the Civil Rights Organizations' proposals to reform the comparative hearing process were again found to be outside the scope of the Comparative Hearing Procedures NPRM, then those proposals should be assigned an "RM" number and put out for comment.

On March 8, 1991, Jeffrey Rochlis filed the only Comment on the Reconsideration/Rulemaking Petition. Mr. Rochlis urged that his proposal for a "finders preference", which like the Civil Rights Organizations' proposals would substantively revise the comparative criteria, also should be put out for comment.

The practical effect of Mr. Rochlis' proposal would be to neutralize and nullify the minority preference, and thus run directly substantively counter to the substantive goals of the Civil Rights Organizations' proposals.[1/] If implemented, it would

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1/ In calling for comment on the Rochlis proposal, the Comparative Hearing Policies NPRM suggests that the "finders preference" will somehow benefit minorities because its proponents came up with two instances in which minorities happened to be the "finders." Id. at 14-15 ¶29. Such an inference is illogical. The Commission must know that nearly all "finders" are nonminorities. This should come as no surprise. Being a "finder" entails engineering and legal costs above and beyond those of prosecuting an application for a construction permit. Minorities often lack access to capital. Minority Ownership in Broadcasting, 92 FCC2d 859 (1982). Thus, many minorities would find the search for a "drop-in" to be a luxury. "Finders" are not always highly motivated to use broadcast licenses to provide diverse new voices to their communities: they are quite often the local stand-ins for engineering firms who contact their old-boy network "finders" when they perceive that a potential new allotment can be engineered into the TV or FM Table of Allotments.

(n. 1 continued on p. 5)

significantly reduce the economic incentives for minorities, or minority-sensitive nonminorities, to apply for broadcast permits and avail themselves of the above-described policies recommended by the Civil Rights Organizations. Since nearly all new FM and TV proceedings include a "finder" as an applicant, a minority preference would be esentially without value in every comparative hearing. Minorities and minority-sensitive nonminorities would hardly be as eager to undergo the risk and torture inherent in a comparative hearing knowing that the "finder", regardless of who he is, will have a preference whose effect is to nullify the impact of a minority preference.

The Rochlis proposal would also nullify any incentive for nonminorities to divest stations to minorities for less than fair market value as contemplated by the Civil Rights Organizations' proposals. Such a minority-sensitive nonminority, once in a comparative hearing, would have his sensitivity credit automatically cancelled out by another applicant's "finders" preference. Thus, few if any sales of stations to minorities under the incentive plan proposed by the Civil Rights Organizations would occur.

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1/ (continued from p. 4)

Official notice may be taken that of over 150 communications consulting engineers practicing fulltime before the FCC today, only one is Black and one is Hispanic. No evidence whatsoever shows that "finders" have been more community-responsive broadcasters than non-finders, although extensive evidence shows that minorities tend to be extraordinarly community-responsive broadcasters. See Metro Broadcasting, Inc. v. FCC, 110 S.Ct. 2997 (1990).

Therefore, the Rochlis proposal and the Civil Rights Organizations' proposals are mutually exclusive. Adoption of the Rochlis proposal would render the Civil Rights Organizations' proposals essentially moot, and signal the death knell for minority ownership through the comparative hearing process.

In the comparative hearing procedures docket, the Commission denied reconsideration to the Civil Rights Organizations. Proposals to Reform the Commission's Comparative Hearing Process to Expire the Resolution of Cases (MO&O), 6 FCC Rcd 3403 (1991) ("Comparative Hearing Procedures MO&O"). Therein the Commission correctly observed that the Civil Rights Organizations had filed their proposals in response to the Comparative Hearing Procedures NPRM, and "in the alternative" ask that "its filing be treated as a petition for Rule Making." Id. at 3405 ¶24. The Commission also discussed Mr. Rochlis' Comments in response to on the Civil Rights Organizations' Reconsideration/Rulemaking Petition at length. Id. at 3405-3406 ¶25. Although the Commission denied the Reconsideration/Rulemaking Petition, it included in the Comparative Hearing Procedures MO&O an ordering clause specifically directing that the Reconsideration/Rulemaking Petition "IS DENIED insofar as it requests reconsideration, but that pleading and the comments thereon filed by Jeffrey Rochlis will be treated as a petition for rulemaking." Id. at 3406 ¶33 (emphasis on the singular preposition "a" supplied).

Further underscoring the desirability of robust rulemaking comment on the Civil Rights Organizations' substantive proposals was Commissioner Barrett's Separate Statement to the Comparative Hearing Procedures MO&O, 6 FCC Rcd at 3410. Commissioner Barrett wrote in pertinent part:

> While I understand that this docket dealt primarily with procedural reform issues, I also am concerned with the comparative criteria proposals that were not addressed in this docket, but saved for a later day [citing the discussion in the Comparative Hearing Procedures MO&O, 6 FCC Rcd at 3406 ¶¶26-28, relating to the Civil Rights Organizations' and Rochlis' petitions]....I am uncomfortable with pushing such issues aside without further analysis or, as a minimum, establishing a definitive plan for further review and analysis of such proposals.

Mr. Rochlis' Comments on the Civil Rights Organizations' proposals were "treated as a petition for rulemaking" and assigned the file number RM-7740 on June 24, 1991. See Policy Statement NPRM at 14 n. 14. On the same day, similar "finders preference" proposals by Gerald Proctor and Larry Fuss were assigned "RM" numbers (RM-7739 and RM-7741 respectively).

Yet despite the explicit ordering clause (¶33 of the Comparative Hearing Procedures MO&O) directing that the Civil Rights Organizations and Mr. Rochlis' proposals "will be treated as a Petition for Rule Making" (emphasis supplied), the Civil Rights Organizations' proposals were not encompassed within the RM number given to Mr. Rochlis -- himself a mere commenter on the Civil Rights Organizations' proposals. Nor were the Civil Rights Organizations proposals assigned an "RM" number. Moreover, at no place in the Comparative Hearing Policies NPRM is the Civil Rights Organizations' proposals even mentioned. Even in the discussion of broadcast experience and of the minority preference -- which the Civil Rights Organizations' proposals specifically sought to broaden -- the Civil Rights Organizations proposals are nowhere mentioned. Id. at 16-17 ¶36. They might as well never have been filed.

On top of that, the fact that the Civil Rights Organizations vigorously opposed the finders preference was nowhere mentioned in the Comparative Hearing Policies NPRM. See "Opposition to Petition for Rulemaking," filed in response to RM-7741 by NAACP, LULAC and NBMC July 24, 1991. Incredibly, the Civil Rights Organizations' opposition to the finders preference was ignored, but Rochlis' response to the Civil Rights Organizations' opposition was considered, along with an ex parte prsentation by Rochlis' counsel. Comparative Hearing Policies NPRM at 14-15 ¶29. The Civil Rights Organizations might as well not have bothered filing their Opposition to the finders preference proposal in RM-7741. Readers of the Comparative Hearing Policies NPRM will thus be misled into believing that the "finders preference" is somehow a pro-minority initiative when it is, in fact, precisely the opposite.2/

**ARGUMENT**

Perhaps the Commission forgot what it did in ¶33 of the Comparative Hearing Procedures MO&O. By not merging the Civil Rights Organizations' proposals into RM-7740 or assigning them another "RM" number, the Commission has sub silentio vacated the

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2/ See Comparative Hearing Policies NPRM at 14 n. 14 (all but endorsing the Rochlis proposal by remarking that Commission "could have adopted the finders preference pursuant to the outstanding petitions" but nonetheless desired further public comment.)

relief provided in ¶33 of the Comparative Hearing Procedures MO&O.3/

For at least five reasons, the Commission erred by ignoring the Civil Rights Organizations' proposals.

First, the Commission cannot vacate its own order without articulating a reason for doing so. By ignoring the Civil Rights Organizations' proposals while taking up Mr. Rochlis' proposal, the Commission vacated ¶33 of the Comparative Hearing Procedures MO&O sub silentio. The Comparative Hearing Policies NPRM provides no reason for doing so; indeed, it fails even to mention the existence of the Civil Rights Organizations' proposals.

Second, even if the Commission were permitted to vacate, sub silentio, ¶33 of the Comparative Hearing Procedures MO&O, the Commission lacks any rational basis for treating the Civil Rights Organizations' proposals differently from the mutually exclusive Rochlis proposal. The Commission is duty bound to treat all those who come before it equally. See Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945); cf. NBC v. U.S., 319 U.S. 190, 226 (1943) ("Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis.") From a procedural

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3/ The Civil Rights Organizations assume that what the Commission has done is to vacate its own previous order sub silentio, because the only other possible interpretation is that the Commission has deliberately decided not to observe its previous order even while leaving that order in effect. This it could not do. See 47 U.S.C. §416(c) ("[i]t shall be the duty of every person, its agents and employees...to observe and comply with such orders so long as the same shall remain in effect.") The Civil Rights Organizations trust that the Commission would not deliberately violate its own order. Alegria I, Inc. v. FCC, 905 F.2d 471, 474 (D.C. Cir. 1990); Reuters Ltd. v. FCC, 781 F.2d 946, 950-51 (D.C. Cir. 1986).

standpoint, there is absolutely no difference whatsoever between Mr. Rochlis' substantive proposals and the Civil Rights organizations' substantive proposals. By treating the Rochlis and Civil Rights Organizations' proposals differently, the Commission departed without explanation from its own precedents, manifested in its uniform practice of considering mutually exclusive counterproposals simultaneously.4/ By ignoring its own precedents without explanation, the Commission has abused its discretion.

Third, even if Mr. Rochlis had never filed a counterproposal to the Civil Rights Organizations proposals, the Civil Rights Organizations' proposals fall squarely within the scope of the Comparative Hearing Policies NPRM and should logically have been consolidated therein. In this docket, the Commission seeks comment on such matters as eliminating integration credit, eliminating proposed program service credit, and eliminating local residence and civic involvement credit. Each of these proposals could seriously undermine opportunities for minority ownership, inasmuch as minority applicants tend to be more likely than nonminority applicants to be civically involved local residents, to propose 100% fulltime integration, and to offer specialized programming for underserved populations. On the other hand, the Civil Rights Organizations' proposals would significantly improve the outlook

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4/ This practice is most frequently manifested in rulemaking proceedings aimed at amending the Table of FM Allotments, 47 CFR §73.202 and the Table of Television Allotments, 47 CFR §73.606. See, eg., Table of FM Allotments (Carolina Beach et al.), 7 FCC Rcd 544 (1992).

for minority applicants, in furtherance of Congressional intent[5/] and as appropriate in light of the sharp decline in minority wnership in the past year.[6/] The Civil Rights Organizations' proposals are significant alternatives to the Commission's preferred course of action, and thus deserved inclusion in the Comparative Hearing Policies NPRM on their own merits. See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 (1983) ("agency rule would be arbitrary and capricious if the agency...entirely failed to consider an important aspect of the problem"). Whether or not the outcome of the instant proceeding will favor minority applicants, it is likely to substantively affect the "balance" between minority preferences and other preferences which the Commission sought to preserve when it established its "daytimer preference" which generally disfavors minorities. NBMC v. FCC, 882 F.2d 277, 63 RR2d 1, 5 (2d Cir. 1988). The Commission must be cognizant of how events and trends, including those of its own making, may materially affect the outcomes of the comparative hearing process. See Bechtel v. FCC, ___ F.2d ___, 70 RR2d 397, 402 (D.C. Cir. 1992). Bechtel provides all the more reason to consider the Civil

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5/ See Act of October 28, 1991, Pub. L. 102-140 (specifying that "none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing...to expand minority and women ownership of broadcasting licenses[.]"

6/ NTIA's November, 1991 report on Minority Ownership Trends found that the number of minority owned commercial television and radio stations declined from 301 to 287 (from 2.9% to 2.7%) in just one year, even as the total number of stations was increasing. This represents a 4.7% decline in minority ownership in one year -- the first decline in the history of broadcasting.

Rights Organizations' proposals jointly with the anti-minority proposals favorably recommended for comment by the Commission.

Fourth, even had there been no Comparative Hearing Policies NPRM, it would be high time to assign an "RM" number to the Civil Rights Organizations' proposals. They have been on the shelf for nearly two years without even being stamped in with an "RM" number by the Secretary -- a ministerial act which, if not performed, essentially pocket vetoes the proposals. The APA requires the Commission to allow citizens to file petitions for rulemaking. 5 U.S.C. §553(e). The Commission's own rules require the Commission to assign petitions for rulemaking "RM" numbers. 47 CFR §1.403 ("[a]ll petitions for rule making...meeting the requirements of §1.401 will be given a file number, and promptly thereafter, a 'Public Notice' will be given (by means of a Commission release entitled 'Petition for Rule Making Filed' as to the petition, file number, nature of the proposal, and date of filing.") While the Commission may have some discretion on when to assign an "RM" number, that discretion is not without limits and cannot be exercised arbitrarily or so as to discriminate against disfavored classes of petitioners. The Commission may not circumvent Section 1.403, which requires it to "promptly" put out a public notice after assigning an "RM" number, by simply failing or delaying interminably the ministerial act of assignment of an "RM" number in the first instance. It should not take two years for any party, even including major national organizations, to have their proposals stamped in by the Secretary. Failing to stamp in the Civil Rights Organizations' proposals with an "RM" number serves no legitimate governmental interest.

The Commission's treatment of minority-filed rulemaking petitions is squarely at odds with the Commission's treatment of petitions for rulemaking by nonminorities, which commonly receive "RM" numbers almost immediately.7/

The Civil Rights Organizations are entitled to rely on the Commission's customary practices. Cf. St. Croix Wireless Co., 3 FCC Rcd 4073 ¶7 (1988), recon. denied, 5 FCC Rcd 4564 (1990). The Commission's custom is to provide RM numbers routinely in about two months.8/ Thus, in processing rulemaking petitions -- except those filed by minority groups -- the Commission's custom is to act "with all deliberate speed." Brown v. Board of Education, 349 U.S. 294 (1955) ("Brown II"). The Commission's studied ignorance of minority organizations' rulemaking proposals continues a pattern of deliberate, nonbenign neglect of rulemaking proposals submitted in

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7/ Compare, eg., Review of the Commission's Regulations and Policies Arffecting Investment in the Broadcast Industry (NPRM and NOI), FCC 92-96 (released April 1, 1992) at 7 ¶13 and 9 ¶18 (calling for comment on four declaratory ruling requests by nonminority interests). An example of the Commission's speed in handling rulemaking rqeuests by nonminorities is its March 22, 1992 assignment of RM-7932 and RM-7933 to the NAB's "FM Freeze" petitions, the effect of which would be to terminate FM comparative hearings (and, with them, new minority ownership except through purchases from incumbents). The NAB's petitions for rulemaking were filed February 10, 1992 and put out for comment just five weeks later.

8/ During the period May 1, 1990 - April 30, 1991, a period which includes the September, 1990 dates of submission of the Civil Rights Organizations' rulemaking proposals discussed herein, 42 petitions for rulemaking (excluding those seeking to amend the TV and FM Tables of Allotments) were filed and given "RM" numbers. The mean time between filing and assignment of an "RM" number was 76 days; the median time was 45 days, and in no case was it more than 327 days. This demonstrates that the Commission's custom is to assign "RM" numbers almost immediately. The Civil Rights Organizations do not know why this otherwise universal practice seems to apply to everyone but minority groups.

good faith by numerous minority groups over the past two decades.9/

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9/ The Commission's treatment of rulemaking proposals filed by the civil rights community is presented below without comment.

(1) It took the Commission nearly three years to rule on NBMC's November 11, 1973 Petition for Rulemaking, denying or deferring action on all 61 of NBMC's proposals. The delay which prompted a partial dissent by Commissioner Hooks. NBMC, 61 FCC2d 1112 (1976). While nine of NBMC's proposals were to be referred to various Commission staff offices, nobody followed through, and to this day, no further proceedings have commenced.

(2) NBMC's 1979 Petition for Rulemaking, with 35 proposals, was denied in its entirety after a 1 1/2 year delay. Advancement of Black Americans in Mass Communications, 49 RR2d 442 (1981).

(3) A decade after it was filed, NBMC's November 20, 1981 Petition for Rulemaking on Minority Ownership still lacks a "RM" number, even after NBMC asked for one at a 1984 en banc meeting of the Commission on the subject of minority ownership. The only result of that en banc meeting is that it was the last time the Commission met en banc to hear the views of minority groups.

(4) NABOB's November, 1981 Petition for Rulemaking on Minority Ownership, seeking liberalization of the distress sale policy to permit sales to minorities for much lower than 75% of fair market value after commencement of a hearing, was dismissed in 1988 solely because of the staleness of the record.

(5) The NAACP's Petition for Rulemaking on the role of drug dealers who use children with FCC-authorized beepers as runners in the drug trade should have been noncontroversial. It was lost by the staff until the Secretary personally found it and gave it an "RM" number (RM-6619). Thereafter, it has sat on the shelf for over four years. The Commission knows it's there, having all but denied it. See Amendment of Part 1 of the Commission's Rules to Implement Section 5301 of the Anti-Drug Abuse Act of 1988 (Report and Order), 6 FCC Rcd 7551, 7556 n. 15 (1991). Today, children under 18 continue to use FCC-regulated beepers in the drug trade without their parents' permission.

(6) Eight other substantive proposals designed to benefit minority ownership, all filed in September, 1990, also yet await the ministerial act of assignment of an "RM" number. See New Rules and Policies Designed to Foster Minority Ownership of Communications Facilities (Petition for Rulemaking of the NAACP, LULAC, NHMC and NBMC, filed September 18, 1990, no file number). The Civil Rights Organizations still await their "RM" numbers, even after having visited personally with each Commissioner, the General Counsel, the Chief of the Mass Media Bureau, and several support staff in early 1991 seeking designation of "RM" numbers. Nobody can say that the Civil Rights Organizations haven't tried faithfully to work through the system.

Fifth, consideration of the anti-minority Rochlis proposal -- especially if undertaken without parallel consideration of pro-minority initiatives such as those recommended by the Civil Rights Organizations -- would so seriously dilute the minority preference as to fall well afoul of Pub. L. 102-140.10/ Consideration of the Rochlis proposal together with the Civil Rights organizations' proposals might reflect the "balanced" approach approved by the Second Circuit in NBMC v. FCC, supra, 63 RR2d at 5 (approving the daytimer preference because it "balances" the minority preference). The Commission may not proceed further with a rulemaking proceeding which so plainly violates the intent of Congress.11/

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10/ One Commissioner has recognized that the instant docket asks "questions that could dilute the diversification criteria; thus, potentially impacting new entrants, including minorities and women, more negatively." Statement of Commissioner Andrew Barrett, Dissenting in Part and Concurring in Part, in MM Docket No. 91-140, FCC 92-98 (released April 10, 1992) at 8.

11/ The Commission could not rationally dilute the minority preference even had Congress not acted to prevent such dilution. In light of the gross underrepresentation of minorities in broadcast station ownership and the NTIA's study showing a sharp decline in minority ownership even as the total number of stations increases (see n. 6 supra), the Commission could not contend that the need for minority ownership "has become less urgent" since its policies were belatedly initiated. See Office of Communication of the United Church of Christ v. FCC, 560 F.2d 529, 544 (2d Cir. 1977) (reversing Commission attempt to remove meaningful EEO regulation from 2/3 of broadcast licensees).

**RELIEF REQUESTED**

In light of the harm done by the Commission's erroneous omission of the Civil Rights Organizations' proposals, the Commission should promptly issue a supplemental notice of proposed rulemaking seeking comment on the proposals, and emphasizing that the proposals are to be given the same consideration as are any other proposals.

Someone might suggest that the Civil Rights Organizations may simply refile their proposals -- for the third time -- as Comments on the Comparative Hearing Policies NPRM. That procedure is insufficient, as it will give Mr. Rochlis, a party in exactly the same procedural posture as the Civil Rights Organizations, considerably more procedural due process than the Civil Rights Organizations will have received.

There are two reasons why the opportunity to refile their proposals is insufficient relief for the Civil Rights Organizations.

First, Mr. Rochlis has already reaped the benefit of being assigned an "RM" number, generating a round of comments and reply comments. He received that relief almost immediately after filing his proposals -- which ironically were filed as comments on the same Reconsideration/Rulemaking Petition by the Civil Rights Organizations which was not included in RM-7740 nor given its own "RM" number. The Civil Rights Organizations have waited nearly two years for the same opportunity for a full public airing of their proposals as Mr. Rochlis enjoys for his proposal.

Second, by having his "RM" number included for comment in the caption of the Comparative Hearing Policies NPRM, Mr. Rochlis will be graced with a wealth of substantive comments (including a comment from the Civil Rights Organizations, opposing his proposal on the grounds that it will operate as a preference system for Whites and will almost always have the effect of eliminating any comparative benefit attendant to the minority preference). Mr. Rochlis will then have an opportunity to research the merits of his opponents' contentions, possibly reformulate his proposal to avoid their objections, and -- above all -- have the last word. The Civil Rights Organizations will have no such opportunities; their detractors will have the last word. Indeed, Mr. Rochlis would get two bites of the rebuttal apple: first in response to the public notice putting out his proposals as an "RM", and second, in reply comments in this proceeding. The right of rebuttal, written into 47 CFR §1.415(c), is fundamental to the development of a full record in a rulemaking proceeding. It is not to be discarded lightly. Absent the relief sought by this Motion, Mr. Rochlis will have that the last word on his proposals -- a privilege denied to the Civil Rights Organizations and their proposals.

Someone might also point out that the Commission has just established a Small Business Advisory Committee (after a two year delay), which might provide a forum for the Civil Rights Organizations to expound on their proposals. While laudable, the Advisory Committee will not be empowered to make rules. The rulemaking process makes rules; advisory committees give advice and issue reports. Rulemaking is "the real thing." It would be patronizing, and indeed smack of segregated governance, for an

advisory committee to become a separate but unequal "minority channel" for input into major decisions.

The Commission may ultimately prefer Mr. Rochlis' substantive proposals as a result of a rulemaking proceeding in which his proposals are the subject of notice and comment. It may not, however, stack the procedural deck to favor Mr. Rochlis' proposal over the Civil Rights Organizations' proposals. See Empire State Broadcasting Corporation (WWKB), 6 FCC Rcd 418 (1991) (procedural due process under Ashbacker requires the Commission to consider mutually exclusive proposals jointly even where the outcome is essentially predetermined). Even if the Commission ultimately selects Mr. Rochlis' anti-minority approach and rejects the Civil Rights Organizations' proposals, it may not reach that result by affording greater procedural opportunities to Mr. Rochlis to develop his case than it affords to others in exactly the same procedural shoes.12/

By ignoring ¶33 of its own Comparative Hearing Procedures MO&O, promising to treat the Rochlis and Civil Rights Organizations' submissions as rulemaking petitions, the Commission

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12/ The Civil Rights Organizations represent nearly 750,000 consumers of broadcast programming, and speak generally for a much larger constituency. Mr. Rochlis represents only himself and his private economic interest, which can be furthered only at the expense of minorities. Nonetheless, the Civil Rights Organizations do not seek more procedural relief than was afforded to Mr. Rochlis -- only equal treatment with him. Nor does this limited Motion request the Commission's endorsement of the Civil Rights Organizations proposals. It requests only that the proposals be treated with procedural regularity.

violated the strict requirement that it treat similarly situated parties equally. It treated Mr. Rochlis "more equally" that it treated the Civil Rights Organizations. See Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969) (Commission exhibited a "curious neutrality in favor of the licensee.") Moreover, it has allowed the Civil Rights Organizations' proposals to languish for nearly two years without even being stamped in with a "RM" number. No legitimate interest has been served by the Commission's avoidance of genuine citizen input into its processes. Its treatment of the Civil Rights Organizations' proposals is legally, intellectually and morally indefensible.

## CONCLUSION

To insure that the Civil Rights Organizations -- who have been quite patient[13/] in waiting for their "RM" numbers -- are given the same procedural due process as was afforded Mr. Rochlis, the Commission should promptly assign the Civil Rights Organizations' proposals an "RM" number or incorporate the Civil Rights Organizations' proposals into RM-7740 as was contemplated in ¶33 of the Comparative Hearing Procedures MO&O; recaption the Comparative Hearing Policies NPRM according, and issue a supplemental notice amending the Comparative Hearing Policies NPRM

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13/ The Commission should applaud, the considerable patience of the Civil Rights Organizations in working within the system to achieve their legitimate objectives in the face of the this record of procedural relief denied, pocket-vetoed and delayed. It is only because the disparity in procedural handling of Mr. Rochlis' anti-minority proposal and the Civil Rights Organizations' pro-minority proposals is so palpable that the Civil Rights Organizations have regrettably had to resort to filing this Motion and the Time-Sensitive Motion for Stay which accompanies it.

and specifically calling for comment on the Civil Rights Organizations' proposals.14/

Respectfully submitted,

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May 1, 1992

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14/ The Civil Rights Organizations regret that this Motion is being filed two weeks into the six week comment cycle. They would have filed it immediately after issuance of the Comparative Hearing Policies NPRM but for the fact that its preparation was interrupted by an apparent heart attack of lead counsel.